IN THE SUPREME COURT OF MISSISSIPPI

PHILIP A. GUNN, SPEAKER OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES — **APPELLANT**

v. — **No. 2016-IA-00442-SCT**

REPRESENTATIVE J.P. HUGHES, JR. — **APPELLEE**

AMICUS CURIAE BRIEF OF THE MISSISSIPPI HOUSE DEMOCRATIC CAUCUS IN SUPPORT OF APPELLEE, REPRESENTATIVE J.P. HUGHES, JR.

On Interlocutory Appeal from the
Circuit Court of the First Judicial District of Hinds County, Mississippi
No. 25CI1:16-cv-00198-WLK

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Hon. Philip A. Gunn, Speaker of the House of Representatives, *Appellant*
2. Michael B. Wallace, Rebecca Hawkins, Charles E. Cowan, Wise Carter Child & Caraway, P.A., *Counsel for the Appellant*
3. Hon. J.P. Hughes, Jr., Representative, *Appellee*
4. S. Ray Hill, III, Clayton O'Donnell, PLLC, *Counsel for Appellee*
5. Hon. Tate Reeves, Lieutenant Governor, *Amicus Curiae*
6. Mark W. Garriga, Robert M. Frey, P. Ryan Beckett, Butler Snow LLP, *Counsel for Amicus Curiae Lt. Gov. Tate Reeves*
7. Mississippi House Democratic Caucus, *Amicus Curiae*
8. Graham P. Carner, Graham P. Carner, PLLC and David Neil McCarty, David Neil McCarty Law Firm, PLLC, *Counsel for Amicus Curiae Mississippi House Democratic Caucus*
9. The Honorable Winston Kidd, *of the Circuit Court of Hinds County*

So CERTIFIED, this the 29th day of June, 2016.

Respectfully submitted,

/s/ Graham P. Carner
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The Mississippi Constitution of 1890 is the paramount and supreme organic law of this State. It must be followed by everyone. And when the Constitution is violated by the Legislature, this Court unquestionably has jurisdiction to address that breach of constitutional duty. This Court should exercise that jurisdiction in this case and hold that the Speaker's actions in this case violate Article 4, Section 59 of the Constitution.

The exceptional set of facts in this matter is not in serious dispute. On the facts and briefs before the Court, the Speaker of the House has admitted that he is not conforming to Article 4, Section 59 of the Mississippi Constitution of 1890. Yet his extraordinary argument is that this does not matter. Even more extraordinary, the Speaker of the House and the Lt. Governor argue that this Court lacks any power to check the legislative branch when it violates the Constitution.

It is the position of the Mississippi House Democratic Caucus[1] that this Court is the guardian of the Constitution. As such, this Court has not only the authority but the constitutional imperative to take action when the Constitution is violated by anyone.

Argument

I. The Supreme Court is the Guardian of the Constitution.

At its essence, this case is focused on whether the Legislature and its leadership are required to follow mandatory provisions of the Mississippi Constitution of 1890. That constitutional provisions are accorded special reverence under our system of laws is axiomatic. All branches of government and their officers are bound by the Constitution. If they are not, then our system of government, with its attendant checks and balances, is turned on its head.

[1] The Mississippi House Democratic Caucus is composed of 48 elected Representatives from across the State of Mississippi. Its elected leader is the Hon. David W. Baria, who represents House District 122 – Hancock. The Mississippi House Democratic Caucus is dedicated to serving the interests of their constituents and furthering progress in the State of Mississippi.

The special place that constitutions hold in our representative democracies is best expounded upon by one of our Founding Fathers, Alexander Hamilton, in *The Federalist* Number 78, entitled "The Judges As Guardians of the Constitution":

> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of their powers, may do not only what their powers do not authorize, but what they forbid.

The Federalist, No. 78 (A. Hamilton) (B. Wright ed. 1961).

In light of this, Hamilton urges that the "courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." *Id.* "A constitution is, in fact, and must be regarded by the judges, as a **fundamental law**." *Id.* (emphasis added). Thus, if a legislative body acts contrary to a fundamental law dictated by a constitution, "that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." *Id.*

Thus, it is the duty of the judiciary "to declare all acts contrary to the manifest tenor of the Constitution void." *Id.* This it must do so long as the constitutional dictate, the fundamental law enshrined in the government's charter, remains in effect. "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act." Simply put, until the Constitution is changed, the people and the government—including the legislative branch—must follow it.

This fundamental respect for constitutional directives has been observed since the early years following implementation of the Mississippi Constitution of 1890. In a case handed down less than a decade following the adoption of the Constitution, this Court described "the supremacy of the constitution as the paramount law of the land—supreme over all departments of the government." *State ex rel. McClurg v. Powell*, 27 So. 927, 930 (Miss. 1900). *See id.* at 928 ("The true view is that the constitution, the organic law of the land, is paramount and supreme over governor, legislature and courts.").

Similarly, in *Henry v. State*, 39 So. 856 (Miss. 1905), this Court, in detailing the proper manner to construe the Constitution, discussed its venerable place in our system of laws, finding that when a clear intention is expressed in our State's Constitution there can be no option but to compel compliance. "Such intention, if manifest from the plain language of the constitution must be followed, regardless of other considerations. The will of the people must be carried out as expressed in the organic law of the state, framed by their chosen representatives. The true meaning once established, the constitution must be maintained inviolate." *Id.* at 871.

The Constitution is the foundation of government, the charter by which the people, the governed, from whom all power derives, set forth the responsibilities and limitations of government. The supreme place of the organic, fundamental laws established in the Mississippi Constitution of 1890 cannot be questioned. And they must be followed by everyone, including the Legislature and its leadership. If a particular provision is believed to inconvenient, burdensome, or inexpedient in modern times, then the solution is to amend the Constitution, not ignore it. Those principles color every other aspect of this case.

II. This Court Unquestionably Has Jurisdiction Over This Dispute and the Court Should Exercise Its Jurisdiction.

The briefs of Speaker Gunn and Lt. Governor Reeves provide a lengthy historical overview of how the courts have handled jurisdictional questions in controversies such as these throughout Mississippi history, including in cases that pre-date the Constitution of 1890. The majority of these authorities are, however, mooted by this Court's most recent foray into this question in *Tuck v. Blackmon*, 798 So.2d 402 (Miss. 2001).

The parties, including Representative Hughes, have thoroughly briefed the details of *Tuck* and The Caucus will not unnecessarily duplicate those efforts. The chief takeaway from *Tuck*, however, bears repeating: this Court unquestionably has the authority and jurisdiction to review these types of cases. The real question is not whether the Court **has** jurisdiction but whether it should, under the circumstances of a particular case, decline to exercise that jurisdiction. In *Tuck*, this Court held that it will refrain from exercising its jurisdiction unless there is (a) a grossly unreasonable interpretation of the Constitution or manifestly wrong exercise of constitutional authority that (b) does substantial harm to the legislative process.[2] *Id.* at 407-408.

This case is one where *Tuck* counsels the exercise of this Court's jurisdiction because, as demonstrated below, the Speaker's actions clearly violate Article 4, Section 59 and do harm to the legislative process. In light of this clear violation of the plain language of the Constitution, the Court would do well to remember the words of the special concurrence in *Tuck*:

> While it is the prerogative of the Legislature to devise, interpret, and enforce its own procedural rules, the judiciary cannot sit idly by and allow the Legislature to act in accordance with those procedural rules when they violate constitutionally protected rights. To do so would be tantamount to sanctioning the constitutional violations simply because they are committed within the walls of the state capitol,

[2] To the extent that this Court, in pre-*Tuck* cases, has held that courts either lack jurisdiction or should decline to exercise that jurisdiction when a clear mandate of the Constitution is not followed by the Legislature, those cases should be abrogated or overruled. *See, e.g., Tuck*, 798 So.2d at 412 (Diaz, J., specially concurring) (advocating that *Dye v. State ex rel. Hale*, 507 So.2d 332 (Miss. 1987) implicitly overruled *Ex parte Wren*, 63 Miss. 512 (Miss. 1886) and *Hunt v. Wright*, 11 So. 608 (Miss. 1892)).

> a structure founded upon the principle of providing equal protection under the law to all citizens.

Id. at 412 (Diaz, J., specially concurring).

III. The Constitution Was Violated Because the Bills Were Not Read.

Because bills are not being read in the House of Representatives under the plain language of the Constitution of 1890, this Court must act within its role as constitutional guardian and require compliance with the Constitution.

The Supreme Court will overrule violations of internal procedure in the Legislature when a two-part test is met. *Tuck*, 798 So. 2d at 407. The Court will intervene when the Legislature (a) uses "a grossly unreasonable interpretation" of the Rules of Procedure, and (b) this interpretation causes "substantial harm" to "the legislative process." *Id*. at 408.

Because these two *Tuck* factors are met, the Court must intervene.

A. The Bills Were Not Read.

Because the Speaker's interpretation of "read" is grossly unreasonable, as no reasonable person can understand what is being broadcast by his machine, the Constitution of 1890 is being violated.

We know exactly what "to read" means by virtue of a contemporaneous definition included in the original version of our Constitution of 1890.[3] To be able to vote, one had to be able to read a section of the Constitution. Const. of 1890, Art. 12, Sec. 244 (since repealed). Yet if one could not read, the requirement was met if you could listen and **understand** what had been read to you. Const. of 1890, Art. 12, Sec. 244 (since repealed).

[3] It is worthwhile to understand that at the time of passage of our Constitution of 1890, there was no such thing as immediate printing upon demand. Bills—which were much shorter than the treatise long leviathans of today—could be read aloud both as a method to allow a Member to understand pending legislation, as well as cut down on the costs of typesetting, printing, and distribution, as well as costly resources such as paper and labor. *See generally* Journal of the House of Rep. of the State of Miss., Special Session of 1894, at 32 (after Governor Stone delivered a lengthy letter to the House, a Member "moved that one thousand copies of the message be printed for the use of the members").

The full definition is found in the former Franchise section:

> On and after the first day of January, A. D., 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the constitution of this State; *or he shall be able to understand the same when read to him*, or give a reasonable interpretation thereof. A new registration shall be made before the next ensuing election after January the first, A.D., 1892.

Const. of 1890, Art. 12, the Franchise, Sec. 244 (since repealed) (emphasis added).[4]

Similarly, in a section that still survives to this day, the oath of office for members of the Legislature demonstrates this plain meaning of the word "read". Article 4, Section 40 contains the oath of office, including "that I will, as soon as practical hereafter, carefully read (or have read to me) the Constitution of this State, and will endeavor to note, and as a legislator to execute, all the requirements thereof imposed on the Legislature…." In the context of the Constitution of 1890, reading or having something read necessarily involves understanding it.

Therefore in the view of our framers, "to read" meant "shall be able to understand." This 19th century era definition is just as applicable today as it was at the time of passage.[5]

Under this understanding of "read," the bills are not actually being read in the House. Article 4, Section 59 allows any single member of the House to demand a reading of the full text of a bill prior to the vote on final passage. Yet no reasonable person has claimed that they can understand the gibberish noise generated by the Speaker's machine. Therefore the request to read bills pursuant to Article 4, Section 59 is in actuality being denied, because the text of the bills are not "read," but instead broadcast at an extremely high speed. Indeed, no one can know

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[4] Our current Constitution of 1890 notes that former Section 244 has been repealed; there is now a placeholder that simply states "NOTE: Former Section 244 provided that, in addition to any other qualifications, every elector must be able to read and write."

[5] For instance, the members of this Court are aware of the requirement that a person be "read his rights" prior to custodial interrogation under the dictates of *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny. This Court would certainly not sanction a system in which an accused was provided these important rights by a machine that "recited" them in unintelligible gibberish that the average person could not understand.

what the machine is actually broadcasting because it is unintelligible and cannot be understood by a reasonable person.

The Speaker maintains that the purpose of the Constitution is being met—although conceding that his machine is broadcasting language at an extremely fast manner. This interpretation of what "shall be read in full" means in Section 59 is a grossly unreasonable interpretation of the language of the Constitution of 1890. No party or amici has urged to this Court that any human being can understand what is being broadcast by the Speaker's machine. It is manifestly wrong to assume that the broadcast conforms to the Constitution. The Speaker's argument that he is in compliance with the "literal words" of Article 4, Section 59 is literally incorrect.

What is occurring in the House of Representatives is not "reading" under the contemporaneous definition of the word "read" in our Constitution of 1890. Under *Tuck*, when the Legislature is relying upon a grossly unreasonable interpretation of the Rules of Procedure, the Court will intervene. 798 So. 2d at 407. This prong has been met.

B. The Failure to Read the Bills Causes Substantial Harm to the Legislative Process.

Because the failure to read the bills has caused substantial harm to the Legislative process, this Court must intervene and halt the violation of the Constitution of 1890.

As *Tuck* makes clear, the Court will reverse when the Legislative process has "suffered substantial harm" as a result of the interpretation of the Constitution.

This substantial harm is apparent from the plain face of the violation itself. The Constitution of 1890 clearly requires that bills "shall be read in full" when any Member demands it. Representative Hughes—a member of the Mississippi House Democratic Caucus—and other Members of the Caucus have requested that bills be read pursuant to Section 59. They were not read, but instead the Speaker's machine broadcast unintelligible gibberish that may or may not

have recited the text of the bill at issue. This disruption caused critical harm to the Legislative process, as it deprived House members of their abilities to meaningfully understand the legislation at hand.

The importance that the Framers of the Constitution placed on the reading requirement at issue is clear. Article 4, Section 59 actually contains two separate reading requirements with respect to the legislative process. The first requirement is that "every bill shall be read by its title on three (3) different days in each House, unless two-thirds (2/3) of the house where the same is pending shall dispense with the rules." Art. 4, § 59. The second requirement is the one at issue in this case: "every bill shall be read in full immediately before the vote on its final passage upon the demand of any member." Art. 4, § 59. The Framers attached special importance to the second reading requirement by making it mandatory upon the request of any single member and by not building in a mechanism to excuse the reading of the full bill prior to the vote on its final passage. The first requirement can be excused by a 2/3 vote of the house in which it is pending. The second requirement, triggered upon the demand of any single member, cannot. To ignore this clear directive does harm to the legislative process.

As a result, the Court should recognize that both prongs of *Tuck* have been met, and rule that the bills must actually be read in a way that promotes understanding as required by the Constitution of 1890.

C. Whether Substantial Harm Has Occurred Could Be Examined Further upon Remand.

In the alternative to ruling upon the Record as it currently exists that substantial harm has occurred, the Supreme Court could rule that the first prong of *Tuck* has been met, and remand to the Circuit Court of Hinds County if it needs further factual investigation of how the Legislative process has been disrupted.

If the Court sees fit to remand, Members of the Mississippi House Democratic Caucus are prepared to give sworn testimony that the legislative process has indeed suffered substantial harm by the failure to have the bills read in accordance with the Constitution of 1890. Furthermore, it could be factually developed that the "#10 setting" on the Speaker's machine does not permit a reasonable person to understand what is being broadcast. However, some settings on the Speaker's machine might allow a reasonable person to understand them, even if not at "normal" speeds. This fact-finding is better done in Circuit Court.

Therefore, in the alternative, this Court could order remand in order to better assess the harm done to the Legislative process by the refusal to read the bills.

CONCLUSION

The Mississippi Constitution of 1890 is the fundamental law of this State. The Constitution must be followed by everyone. This Court is the guardian of the Constitution, vested with both the constitutional authority and constitutional imperative to interpret that document and compel adherence to it. In light of the clear and even admitted violation of Article 4, Section 59 presented by this case, this Court should exercise its jurisdiction and grant the relief requested by Appellee, Representative J.P. Hughes, Jr.

Respectfully submitted, this the 29th day of June, 2016.

MISSISSIPPI HOUSE
DEMOCRACTIC CAUCUS

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CERTIFICATE OF SERVICE

I, Graham P. Carner, certify that I have served a copy of the above and foregoing document to the following via filing with the MEC electronic filing system:

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And that I have further served a paper copy via first class U.S. Mail on the following:

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On June 29, 2016,

/s/ Graham P. Carner
Graham P. Carner